83 - 1820 (1)

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROLAND LEE GOAD
Petitioner

v.

MARY BETH GOAD
Respondent

PETITION FOR WRIT OF CERTIORARI TO ~~THE 272ND JUDICIAL DISTRICT COURT, BRAZOS COUNTY, TEXAS~~ COURT OF APPEALS OF TEXAS, FOURTEENTH SUPREME JUDICIAL DISTRICT

ROLAND LEE GOAD (pro se)
Route 1, Box 646
Huntsville, Texas 77340
(409) 295-2205

May 1, 1984

Of Counsel:
J. ANDREW ROLLINS
Box 2717
Bryan, Texas 77805
(409) 260-9158
Counsel for Respondent

38 pp

QUESTIONS PRESENTED

1. Whether a 1980 divorce decree partitioning future Air Force retirement benefits as community property conflicts with the Texas "Bill of Rights" provision declaring that "no man, or set of men, is entitled to exclusive separate public emoluments or privileges, but in consideration of public service."

2. Whether a 1980 divorce decree partitioning future Air Force retirement benefits as community property conflicts with the Texas Constitution provision that states that "No current wages for personal services shall ever be subject to garnishment, except for the enforcement of court-ordered child support payments."

3. Whether the language of 15 U.S.C. 1673c that "No court of the United States or any State, and no State (or officer or agency thereof) may make, execute, or enforce any order or process in violation of this section." is broad enough to preclude trustee process that would negate the statutory exemptions from garnishment provided in the Consumer Credit Protection Act (15 U.S.C. 1671 et seq).

4. Whether military non-disability retired pay is current or deferred compensation; and, whether the unearned prospective emoluments affixed to a public office are a species of personal property subject to partition in divorce proceedings.

5. Whether a declaratory or interpretive legislative act may apply retroactively to annul a prior decision of a reviewing court of last resort or remove a pending case from review in the courts of justice; whether 10 U.S.C. 1408(c)(1) is constitutionally infirm.

INDEX

TABLE OF CASES

STATUTES

TEXTBOOKS

ARTICLES

MISCELLANEOUS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No.

ROLAND LEE GOAD
Petitioner,

v.

MARY BETH GOAD
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE 272ND JUDICIAL DISTRICT COURT, BRAZOS COUNTY, TEXAS

Roland Lee Goad petitions this Court for a writ of certiorari to the 272nd Judicial District Court, Brazos County, Bryan, Texas 77801.

OPINIONS BELOW

The 272nd District Court's order of February 10, 1983 (App. A, la infra) denying Petitioner's post-judgement motion seeking to vacate the portion of a divorce decree ordering a division of Air Force retirement benefits as community property is the basis for this petition for writ of certiorari.

On October 13, 1983 the Court of Appeals, Fourteenth Supreme Judicial District of Texas at Houston, in an unpublished opinion and order (App. B & C, p. 2a-4a, infra) dismissed Petitioner's appeal for want of jurisdiction.

On February 22, 1984 the Texas Supreme Court refused Petitioner's application for writ of error with the notation "No Reversible Error". *"Goad v. Goad*, C-2591, 27 Tex.Sup.Ct.J. 244 (Feb. 25, 1984). Petitioner's motion for rehearing was overruled on March 21, 1984. 27 Tex.Sup.Ct.J. 280 (Mar. 24, 1984).

JURISDICTION

The 272nd Judicial District order (App. A, p. la infra) was signed on February 10, 1983. Petitioner has timely perfected his appeal in the immediate appellate courts and his application for writ of certiorari in this Court.

The jurisdiction of this Court to review this case is invoked under 28 U.S.C., section 1257(3).

The 272nd Judicial District Court, Brazos County, Texas has decided an important question of federal law which has not been, but should be, settled by this Court. The decision of the 272nd District Court disposed of a federal question in a way that conflicts with applicable decisions of this Court.

Two important federal legislative acts are presented for plenary review in this Court, neither act has previously come under review by this Court. These Acts are:

1. The Uniformed Services Former Spouses' Protection Act (10 U.S.C. 1408), and

2. The Consumer Credit Protection Act (15 U.S.C. 1671 et seq.).

JURISDICTION IN THE COURT BELOW

Petitioner's action in the 272nd District Court was brought in conformance with the practice and procedure outlined in the *Restatement (Second) of Judgements,* section 78 (1982) where it is stated:

> Relief from a judgement must be obtained by means of a motion for that purpose in the court that rendered the judgement unless relief may be obtained more fully, conveniently, or appropriately by some other procedure ... The motion is to be distinguished from a separate action, traditionally one in equity, to set aside a judgement, and from attack on a judgement made defensively when the judgement in question is relied upon by an opposing party in the course of a subsequent action ... The motion is made in the court that rendered the judgement and may be used to assert most of the grounds upon which relief from a judgement may be obtained. p. 228.

Further authority to support the procedure selected is found in the *Restatement (Second) of Judgements,* section 80, Reporter's Note, Comment a. beginning on page 247:

> Comment a. As defined by many authorities and the first Restatement, a "collateral attack" is one that is made through some other procedural medium than motion for new trial, appeal, postjudgement motion, or independent suit in equity to set aside the judgement, all of which were classified as "direct attack" **** Id. at 247-8. With the merger of law and equity, grounds for avoiding a judgement not only can be but also are required to be asserted in the action in which the judgement is invoked as a basis for claim or defense ... See generally, Comment, The Value of the Distinction Between Direct and Collateral Attacks on Judgement, 66 Yale L.J. 526 (1957). Id. at 249.

> This leaves open the question of which avenue of relief should be preferred. Under merged procedure, the judgement can be contested in the subsequent action itself. It can also be litigated in any court of general jurisdiction that could obtain jurisdiction over the parties. Furthermore, given the widespread adoption of Rule 60(b) of the Federal Rules of Civil Procedure and analogous provisions, relief on at least some grounds, other than "voidness" can be obtained by the motion procedure in the original action. Id. at 249-50.

Petitioner has brought a direct attack in the same court and in the same action as the original proceedings; and that action has been removed to this Court, through intermediate appellate courts, for direct review. This action comports with the Texas Supreme Court's dictum in *Segrest v. Segrest*, 649 S.W.2d 610, 611 (Tex. 1983) that:

> It is well established that a voidable judgement is not open to collateral attack, but can only be corrected by direct review.

THE UNITED STATES AS A THIRD PARTY

Questions presented in this case draw into question the constitutionality of an Act of Congress, therefore 28 U.S.C., section 2403(a) may be applicable. Accompanying this petition is an affidavit of service showing that three (3) copies of this petition have been served upon the Solicitor General, Department of Justice, Washington, D.C. 20530.

The Act drawn in question is the Uniformed Services Former Spouses' Protection Act (10 U.S.C. 1408), specifically the retrospective application of the Act to judgements, decrees, and orders entered before the effective date of the Act and the Act's retrospective abrogation of this Court's decision in *McCarty v. McCarty*, 453 U.S. 210 (1981).

CONSTITUTIONAL PROVISIONS AND STATUTES THAT THE CASE INVOLVES

The following constitutional and statutory provisions are involved in this case. The texts are reprinted in Appendix D beginning at p. 5a infra.

United States Constitution

Article I, section 9, clause 7
Amendment V
Amendment X
Amendment XIV, section 1

United States Statutes

10 U.S.C., sec. 1408(c)(1) (96 Stat. 731)
10 U.S.C., sec. 1408 note (96 Stat. 737)
15 U.S.C., sec. 1672(a)
15 U.S.C., sec. 1672(b)
15 U.S.C., sec. 1672(c)
15 U.S.C., sec. 1673(a)
15 U.S.C., sec. 1673(b)(1)
15 U.S.C., sec. 1673(b)(2)
15 U.S.C., sec. 1673(c)
15 U.S.C., sec. 1677
31 U.S.C., sec. 1301a
37 U.S.C., sec. 701(c)

Texas Constitution

Article I, Section 3
Article I, Section 13
Article I, Section 16
Article I, Section 29
Article XVI, Section 28

THE UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT

The Act is found in Public Law No. 97-252 (Sept. 8, 1982) (96 Stat. 730). Section 1002, subdivision (a) of the Act added section 1408 to Title 10 of the United States Code. Subsection (c)(1) provides:

> (c)(1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

The committee report accompanying the measure explains the purpose of subsection (c)(1) as follows:

> The purpose of this provision is to place the courts in the same position that they were in on June 26, 1981 the date of the *McCarty* decision, with respect to treatment of non-disability military retired or retainer pay. The provision is intended to remove federal pre-emption found to exist by the United States Supreme Court and permit State and other courts of competent jurisdiction to apply pertinent State or other laws in determining whether military retired or retainer pay should be divisable. Nothing in this provision requires any division; it leaves that issue up to the courts applying community property, equitable distribution or other principles of marital property determination and distribution. The power is returned to the courts retroactive to June 26, 1981. This retroactive application will at least afford individuals who were divorced (or had decrees modified) during the interim period between June 26, 1981 and the effective date of this legislation the opportunity to return to courts to take advantage of this provision. 1982 U.S. Code Cong. & Admin. News, p. 1611, legislative history, Senate Report No. 97-502.

The conference report discussed the effective date section of the act and the effect of 1408(c)(1) as follows:

> The conferees adopted the provision contained in the House amendment, related to the application of the new Title X to court orders finalized before the *McCarty* decision. Although the conference report contains no prohibition against courts reopening decisions before that date, the conferees agreed that changes to court orders finalized before the *McCarty* decision should not be recognized if those changes were effected after the *McCarty* decision (and before the effective date of the new title X) to implement the holding in that decision (for example a modification setting aside a pre-McCarty division of military retired pay). 128 Cong. Rec. H5999-6000 (daily ed. August 16, 1982, conference explanation).

In the March 1983 issue of the *Texas Bar Journal,* two law professors teamed up to construe the Act:

> Modifications based on *McCarty* should not be given effect by courts. **** It is true that Section (c)(1) uses permissive language. It is also true that the language in the direct enforcement section is in prospective form. Nonetheless, the intent of Congress is clear. All effects of *McCarty* are to be removed. Newton & Trail, *Uniformed Services Former Spouses' Protection Act - A Legislative Answer to the McCarty Problem,* 46 Tex. B.J. 291, 295-6 (1983).

On April 13, 1983 the Texas Supreme Court recited its opinion in *Segrest v. Segrest,* 649 S.W.2d 610 (Tex. 1983) where the Court stated:

> Title 10, section 1408 of the Department of Defense Authorization Act of 1983 makes *McCarty* nugatory with respect to its application to judgements rendered after the date of the decision. 649 S.W.2d at 613, note 2.

At about the same time the Texas Supreme Court released its opinion in *Segrest*, Professor William A. Reppy, Jr. in one of his lucid moments was writing:

> USFSPA purports to breathe new life into a pre-McCarty decree calling for direct payments to the ex-spouse. But the act's apparent attempt to eliminate the member's rights under a final judgement applying *McCarty* retroactively probably is an unconstitutional taking of property in violation of the Fifth Amendment due process clause. Reppy, *Reconsidering the Rules for Military Benefits,* 5 Fam. Advocate 30, 33 (Spring 1983).

In the same issue of *Family Advocate*, Representative Patricia Schroeder (who was the floor manager of the Bill in the House) wrote:

> But the recently enacted Uniformed Services Former Spouses' Protection Act (USFSPA) allows the division of military pensions under certain circumstances. With divorce decrees finalized on or after February 1, 1983, the legislation authorizes state courts to treat military pensions as marital or non-marital property (to be divided or not to be divided) in the same manner that they treat non-military pensions. Schroeder, *Analyzing the Act and its Ambiguities,* 5 Fam. Advocate 34 (1983).
>
> Under the "plain meaning" rule of statutory construction, courts usually will not look outside the statutory language when interpreting a nonambiguous statute. There are exceptions, however, and the act's complex language further complicates the matter. Thus additional legislative or judicial action may be needed to determine whether decrees finalized before June 26 can or cannot be modified. Id. at 35.

STATEMENT OF THE CASE

The parties were divorced in 1980. The decree of divorce was signed on September 19, 1980, Cause 23,862-A, 272nd District Court, Brazos County, Texas. (App. E, pp 10a-14a infra).

At trial on August 18, 1980, Petitioner raised the question of federal pre-emption of state case law dividing military retired pay as community property. The trial judge overruled Petitioner's point and in "The Court's Memorandum Brief for Attorneys" (App. F, pp 15a-18a infra) explained his reasoning for overruling Petitioner's point.

Neither party appealed.

On October 20, 1980 this Court noted probable jurisdiction in *McCarty v. McCarty*, No. 80-5, 449 U.S. 917 (1980).

On December 18, 1980, Petitioner, relying on federal pre-emption, filed his first post-judgement motion in the 272nd District Court seeking to have the portion of the divorce partitioning Air Force retirement benefits vacated or set aside as void.

On June 26, 1981 this Court recited its opinion in *McCarty v. McCarty*, 453 U.S. 210 (1981).

On July 13, 1981, relying on *McCarty* as dispositive of the question, Petitioner filed an amended motion in the 272nd District Court seeking to have the void portion of the divorce decree vacated or set aside.

On February 18, 1982, Petitioner's amended motion was dismissed for "lack of jurisdiction". (App. G, p. 19a infra).

On March 11, 1982, Petitioner sought by mandamus in the Texas Supreme Court, to have the dismissed actions restored to the docket of the 272nd District Court and heard on the merits.

Motion for leave to file the application for a writ of mandamus was overruled. *Goad v. Smith*, C-1098, 25 Tex.Sup.Ct.J. 224 (March 20, 1982).

On July 23, 1982 the Petitioner filed his second post-judgement motion in the 272nd District Court seeking to have the portion of the divorce decree partitioning Air Force retirement benefits vacated or set aside as void. (App. H, pp 20a-21a infra).

On January 6, 1983 Petitioner filed a special pleading denominated "Attack on Judgement -- Constitutional Grounds" also seeking to have the portion of the divorce decree partitioning Air Force retirement benefits vacated or set aside as void. (App. I, pp 22a-23a infra).

On February 1, 1983 the Uniformed Services Former Spouses' Protection Act became "law".

On February 10, 1983 the court order was signed that denied Petitioner motion and pending actions in the 272nd District Court. (App. A, p. 1a infra).

On March 28, 1983 Petitioner filed his "Appellant's Brief" in the Court of Appeals, Fourteenth Supreme Judicial District of Texas at Houston, Cause B14-83-206-CV. (App. J, pp 24a-29a infra).

On October 13, 1983, Cause B14-83-206-CV was dismissed for want of jurisdiction. (App. B & C, pp 2a-4a infra).

On October 20, 1983 Petitioner's motion for rehearing was filed in Cause B14-83-206-CV (App. K, pp 30a-32a infra). Motion was overruled on October 27, 1983, no order or opinion.

On November 18, 1983 Petitioner's Application for Writ of Error was filed in the Texas Supreme Court, No. C-2591. (App. L, pp 33a-34a infra). Application was dismissed on February 22, 1984

with notation "No Reversible Error", *Goad v. Goad*, C-2591, 27 Tex.Sup.Ct.J. 244 (Feb. 25, 1984). Petitioner's motion for rehearing was overruled on March 21, 1984, 27 Tex.Sup.Ct.J. 280 (March 24, 1984).

Petitioner now brings Application for Writ of Certiorari in this Court seeking to review the order of the 272nd District Court denying Petitioner's post-judgement motion filed in that court on July 23, 1982.

FEDERAL QUESTIONS PRESENTED

1. Whether a 1980 divorce decree partitioning future Air Force retirement benefits as community property conflicts with the Texas "Bill of Rights" provision declaring that "no man, or set of men, is entitled to exclusive separate public emoluments or privileges, but in consideration of public services."

This point was initially raised in the 272nd District Court on January 6, 1983 by a special pleading denominated as "Attack on Judgement - Constitutional Grounds" (App. I, pp 22a-23a infra). Point was denied per order of the court signed February 10, 1983 (App. A, p. la infra).

This point was raised in the Fourteenth Supreme Judicial District of Texas at Houston in Cause B14-83-206-CV, by point of error number one in "Appellant's Brief" filed on March 28, 1983. (App. J, p. 25a infra). Action was dismissed for want of jurisdiction. (App. B, p. 2a infra).

This point was raised in Petitioner's Application for Writ of Error in the Texas Supreme Court, No. C-2591, filed on November 18, 1983, Point of error number one/B. (App. L, p. 34a infra). Action was dismissed on February 22, 1984 *Goad v. Goad*, C-2591, 27 Tex.Sup.Ct.J. 244 (Feb. 25, 1984).

2. Whether a 1980 divorce decree partitioning future Air

Force retirement benefits as community property conflicts with the Texas Constitution provision that states that "No current wages for personal services shall ever be subject to garnishment, except for the enforcement of court-ordered child support payments."

This point was raised in the 272nd District Court as point of error number three in Petitioner's post-judgement motion filed on July 23, 1982. (App. H, p.21a infra). Point was denied in court order signed February 10, 1983. (App. A, p. la infra).

This point was raised as point of error number IV in the Fourteenth Supreme Judicial District of Texas at Houston, Cause B-14-83-206-CV. (App. J, p. 25a infra). Dismissed per order of court, App. B, p 2a infra.

Raised in the Texas Supreme Court per Point of error number One/E, in Petitioner's Application for Writ of Error, C-2591, filed November 18, 1983. Action dismissed on February 22, 1984. *Goad v. Goad*, 27 Tex.Sup.Ct.J. 244 (Feb. 25, 1984).

3. Whether the language of 15 U.S.C. 1673c that "No court of the United States or any State, and no State (or officer or agency thereof) may make, execute, or enforce any order or process in violation of this section." is broad enough to preclude trustee process that would negate the statutory exemptions from garnishment provided in the Consumer Credit Protection Act (15 U.S.C. 1671 et seq).

Point of error number three in the 272nd District Court in Petitioner's post-judgement motion filed on July 23, 1982. (App. H, p 21a infra). Denied per court's order signed February 10, 1983. (App. A, p. la infra).

Point of error number IV in the Court of Appeals. No. B-14-83-206-CV, filed March 28, 1983. Dismissed on October 13, 1983 per order of court (App. B, p. 2a infra).

Point of error number one/E, in Petitioner's Application for writ of error in Texas Supreme Court, C-2591, filed November 18, 1983. Action dismissed February 22, 1984. *Goad v. Goad,* 27 Tex.Sup.Ct.J. 244 (Feb. 25, 1984).

4. Whether military non-disability retired pay is current or deferred compensation; and, whether the unearned prospective emoluments affixed to a public office are a species of personal property subject to partition in divorce proceedings.

Point of error "First" in Petitioner's post-judgement motion filed in 272nd District Court on July 23, 1982. (App. H, p. 21a infra). Denied per order of court signed on February 10, 1983. (App. A, p. la infra).

Point of error II in the Court of Appeals, B14-83-206-CV, filed March 28, 1983. (App. J, p 25a infra). Dismissed per order of court on October 13, 1983. (App. B, p. 2a infra).

Point of error One/C in Petitioner's Application for writ of error in the Texas Supreme Court, filed November 18, 1983. (App. L, p 34a infra). Dismissed on February 22, 1984, *Goad v. Goad,* C-2591, 27 Tex.Sup.Ct.J. 244 (Feb. 25, 1984).

5. Whether a declaratory or interpretive legislative act may apply retroactively to annul a prior decision of a reviewing court of last resort or remove a pending case from review in the courts of justice; whether 10 U.S.C. 1408(c)(1) is constitutionally infirm.

This point was not formally raised in the 272nd District Court. On July 23, 1982 the Uniformed Services Former Spouses' Protection Act existed only in that capacious limbo known as the "legislative process". At the hearings in the 272nd District Court on January 3, 1983 and on January 28, 1983, the Act was orally briefed to the court but no transcription of the proceedings was preserved.

The point was extensively briefed in the Court of Appeals, Point of error III (App. J, p. 25a infra). The text of Petitioner's position concerning the Act, as presented to the Court of Appeals is summarized in App. J, pp 26a-29a infra. Action was dismissed for want of jurisdiction. (App. B, p. la infra).

This point is implicitly included in point of error One/D raised in the Texas Supreme Court. (App. L, p. 34a infra). Filed November 18, 1983. Dismissed on February 23, 1984. *Goad v. Goad,* C-2591, 27 Tex.Sup.Ct.J. 244 (Feb. 25, 1984).

6. Whether a public disbursing officer, in his official capacity, and in the public funds in his custody, has any goods, moneys, credits, or effects of any private person in his custody and whether he owes a debt from the public treasury to anyone; whether a public disbursing officer of the federal government is amenable to attachment or garnishee process from any court because of having such funds in his possession or control.

This question is implicit in this entire case. If it may properly be decided that there is no private property, funds, credits, or goods in the public treasury then the entire range of questions presented here and the efforts to determine "ownership" of military retired pay become moot.

NOTE: At first blush, it may appear that questions number 1, 2, and 4 do not present a significant federal question. Petitioner respectfully posits that the federal government does have a special interest in ensuring that the states exercise their police and regulatory powers without infringing upon fundamental rights reserved to the people in the Bill of Rights of the State constitution.

REASONS FOR ALLOWANCE OF THE WRIT

This case warrants review by this Court to resolve apparant conflicting provisions of the Consumer Credit Protection Act (15 U.S.C. 1671 et seq) providing restrictions on garnishment of disposable earnings and the provisions of the Uniformed Services Former Spouses' Protection Act (10 U.S.C. 1408) allowing garnishment of disposable retired or retainer pay.

This case also presents for review several fundamental questions of critical importance in intragovernmental relations between the co-ordinate branches of the federal government and intergovernmental relations between the federal and state governments.

Also presented for resolution are several questions concerning constitutional law - courts open to all litigants - right to a hearing when constitutional questions are raised - protection from retroactive legislation - separation of powers -nondelegation doctrine - constitutional supremacy over conflicting statutes, etc.

Also two important federal legislative acts are presented for plenary review in this Court.

The Consumer Credit Protection Act (15 U.S.C. 1671 et seq) as amended in 1977 has potential application to perhaps half the population of this country, however it has been totally ignored by the courts in Texas. Petitioner can find no instance where the Act has been recognized or applied by a Texas court.

The Uniformed Services Former Spouses' Protection Act (10 U.S.C. 1408) presents a situation too gross to be believed.

Representative Patricia Schroeder, the floor manager of the Bill in the House, admits that additional legislative or

judicial action may be needed to determine whether decrees finalized before June 26, 1981 can or cannot be modified (see page 8 supra). In the same article she states that the Act applies to divorce decrees finalized on or after February 1, 1983.

Professor Joseph McKnight wrote:

> Finally, on September 8, 1982, the President signed the Uniformed Services Former Spouses' Protection Act, effective February 1, 1983. A new era of confusion has begun. McKnight, *Family Law: Husband and Wife*, 37 Sw.L.J. 100 (1983).

By refusing to even entertain a challenge to the validity of the Act, Texas courts have compounded their confusion with a case of self-inflicted blindness.

CONCLUSION

If there was ever a single case crying out for this Court's attention, it is this one.

The outcome of this case would directly affect most of the 1.25 million military personnel now in receipt of retired or disability pay as well as a large portion of the 2.1 million military personnel now serving on active duty.

The Consumer Credit Protection Act has possible application to well over 100 million Americans.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROLAND LEE GOAD (pro se)
Rt. 1, Box 646
Huntsville, Texas 77340

NO. 23,862-A

IN THE MATTER OF THE MARRIAGE OF	§	IN THE DISTRICT COURT OF
	§	
	§	BRAZOS COUNTY, TEXAS
MARY BETH GOAD	§	
	§	272ND JUDICIAL DISTRICT
AND	§	
	§	
ROLAND LEE GOAD	§	

ORDER DENYING MOTION

On the 28th day of January, 1983, came on to be finally heard the "RESPONDENT'S MOTION TO VACATE OR SET ASIDE PORTION OF JUDGEMENT THAT IS VOID", filed in this Court on July 23, 1982, by Roland Lee Goad.

ROLAND LEE GOAD appeared in person, pro se.

MARY BETH GOAD appeared by her attorney of record, J. ANDREW ROLLINS.

The Court, after hearing the evidence and argument of ROLAND LEE GOAD, pro se, and of J. ANDREW ROLLINS, Attorney of Record for MARY BETH GOAD, does order the "RESPONDENT'S MOTION TO VACATE OR SET ASIDE PORTION OF JUDGEMENT THAT IS VOID", filed in this Court on July 23, 1982 by ROLAND LEE GOAD, pro se, be, and is hereby, in all things, DENIED.

SIGNED: February 10th, 1983.

ERWIN G. ERNST, Judge Presiding
272nd Judicial District Court
Brazos County, Texas

Judgement of the Court of Appeals, October 13, 1983.

B14-83-206-CV

IN THE
FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT HOUSTON

ROLAND LEE GOAD Appellant
v.
MARY BETH GOAD Appellee

Appeal from the 272nd District Court
of Brazos County
Cause No. 23,862-A

JUDGEMENT

"On this day came on to be heard the Court's own motion to dismiss the appeal from the order denying a motion to vacate a portion of a divorce decree signed and entered by the court below on February 10, 1983.

It is ordered and adjudged that the appeal be and is dismissed. It is further ordered that all costs incurred by reason of this appeal be paid by the appellant, Roland Lee Goad. It is further ordered that this decision be certified below for observance."

Dismissed and opinion filed October 13, 1983.

Unpublished opinion of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas at Houston, October 13, 1983.

B14-83-206-CV

IN THE
FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT HOUSTON

ROLAND LEE GOAD Appellant
v.
MARY BETH GOAD Appellee

Appeal from the 272nd District Court
of Brazos County
Cause No. 23,862-A

OPINION

This is an appeal from an order denying a motion to vacate a portion of a divorce decree.

The parties were divorced and their properties were divided by a divorce judgement signed September 19, 1980. No appeal was perfected from that judgement.

On July 23, 1982, appellant filed a motion to vacate the portion of the divorce decree which ordered division of air force retirement benefits as community property. The motion was denied February 10, 1983, and appellant appealed.

On June 26, 1981, the United States Supreme Court held that military retirement benefits were not divisible as community

property in a state court, *McCarty v. McCarty,* 453 U.S. 210 (1981). A final, pre-1981 divorce decree treating military retirement pay as community property is not void, however, but merely voidable. *Segrest v. Segrest*, 649 S.W.2d 610 (Tex. 1983).

After 30 days elapse following rendition of a voidable judgement, a court is without jurisdiction to set aside that judgement by a motion to vacate. *Glenn W. Casey Construction, Inc. v. Citizen's National Bank,* 611 S.W.2d 695 (Tex.Civ.App. - Tyler 1980); see *Krause v. White*, 612 S.W.2d 639 (Tex.Civ.App. -Houston (14th Dist.) 1981). Since the trial court had no jurisdiction to entertain the motion to vacate, its denial of that motion is not appealable. Consequently this Court has no jurisdiction of the purported appeal. *Eubanks v. Hand,* 578 S.W.2d 515 (Tex.Civ.App. - Corpus Christi 1979, writ ref'd n.r.e.)

On September 29, 1983, notification was transmitted to all parties of the Court's intent to dismiss the appeal for want of jurisdiction. Appellant's response advances no argument to support a finding of jurisdiction.

Accordingly the appeal is dismissed for want of jurisdiction.

PER CURIAM

Judgement rendered and Opinion filed October 13, 1983.

No Publication - TEX. R. CIV. P. 452.

Panel consists of Associate Justices Pressler, Robertson and Cannon.

CONSTITUTIONAL PROVISIONS AND STATUTES THAT THE CASE INVOLVES

UNITED STATES CONSTITUTION:

Article I, section 9, clause 7: No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

Amendment V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment X: The powers not delegated to the United States by the Constitution, nor prohibited by the States, are reserved to the States respectively, or to the people.

Amendment XIV, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES STATUTES:

10 U.S.C., section 1408(c)(1) (96 Stat. 731): Subject to the

limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

10 U.S.C., section 1408, note (96 Stat. 737): Subsection (d) of section 1408 of title 10, United States Code, as added by section 1002(a), shall apply only with respect to payments of retired or retainer pay for periods beginning on or after the effective date of this title, but without regard to the date of any court order. However, in the case of a court order that became final before June 26, 1981, payments under this subsection may only be made in accordance with such order as in effect on such date and without regard to any subsequent modifications.

15 U.S.C., section 1672(a): The term "earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise and includes periodic payments pursuant to a pension or retirement program.

15 U.S.C., section 1672(b): The term "disposable earnings" means the part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld.

15 U.S.C., section 1672(c): The term "garnishment" means any legal or equitable procedure through which earnings of any individual are required to be withheld for payment of any debt.

15 U.S.C., section 1673(a): Except as provided in subsection (b) of this section and in section 1675 of this title, the maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed

(1) 25 per centum of his disposable earnings for that week, or

(2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage prescribed by section 206(a)(1) of Title 29 in effect at the time the earnings are payable,

whichever is less. In the case of earnings for any pay period other than a week, the Secretary of Labor shall by regulation prescribe a multiple of the Federal minimum hourly wage equivalent in effect to that set forth in paragraph (2).

15 U.S.C., section 1673(b)(1): The restrictions of subsection (a) of this section do not apply in the case of

(A) any order for the support of any person issued by a court of competent jurisdiction or in accordance with an administrative procedure, which is established by State law, which affords substantial due process, and which is subject to judicial review.

(B) any order of any court of the United States having jurisdiction over cases under chapter 13, of Title 11.

(C) any debt due for any State or Federal tax.

15 U.S.C., section 1673(b)(2): The maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment to enforce any order for the support of any person shall not exceed -

(A) where such individual is supporting his spouse or dependent child (other than a spouse or child with respect to whose support such order is used), 50 per centum of such individual's disposable earnings for that week; and

(B) where such individual is not supporting such a spouse

> or dependent child described in clause (A), 60 per centum of such individual's disposable earnings for that week;

except that, with respect to the disposable earnings of any individual for any workweek, the 50 per centum specified in clause (A) shall be deemed to be 55 per centum and the 60 per centum specified in clause (B) shall be deemed to be 65 per centum, if and to the extent that such earnings are subject to garnishment to enforce a support order with respect to a period which is prior to the twelve-week period which ends with the beginning of such workweek.

15 U.S.C., section 1673(c): No court of the United States or any State, and no State (or officer or agency thereof), may make, execute, or enforce any order or process in violation of this section.

15 U.S.C., section 1677: This subchapter does not annul, alter, or affect, or exempt any person from complying with, the laws of any State

> (1) prohibiting garnishments or providing for more limited garnishments than are allowed under this subchapter, or
>
> (2) prohibiting the discharge of an employee by reason of the fact that his earnings have been subjected to garnishment for more than one indebtedness.

31 U.S.C., 1301a (formerly 628): Except as otherwise provided by law, sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others.

37 U.S.C., section 701(c): An enlisted member of the Army or the Air Force may not assign his pay, and if he does so, the assignment is void.

TEXAS CONSTITUTION

Article I, BILL OF RIGHTS: That the general, great and essential principles of liberty and free government may be recognized and established, we declare:

Article I, section 3. All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.

Article I, section 13. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

Article I, section 16. No bill of attainder, ex post acto law, retroactive law, or any law impairing the obligation of contracts, shall be made.

Article I, section 29. To guard against transgressions of the high powers herein delegated, we declare that everything in this "Bill of Rights" is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void.

Article XVI, section 28. No current wages for personal service shall ever be subject to garnishment, except for the enforcement of court-ordered child support payments.

Decree of Divorce, signed by presiding judge, 272nd District Court, Brazos County, Texas on September 19, 1980.

NO. 23,862-A

In The Matter Of The Marriage Of	In The District Court Of
	Brazos County, Texas
Mary Beth Goad	
And	272nd Judicial District
Roland Lee Goad	

DECREE OF DIVORCE

On the 18th day of August, 1980, Petitioner, MARY BETH GOAD, appeared in person and by attorney and announced ready for trial.

Respondent, ROLAND LEE GOAD, appeared in person and announced ready for trial.

The Court, having examined the pleadings and heard the evidence and argument of counsel, finds that all necessary residence qualifications and prerequisites of law have been legally satisfied, that this Court has jurisdiction of all the parties and subject matter of this cause, and that the material allegations contained in Petitioner's pleadings are true. A jury was waived, and all matters in controversy, including questions of fact and law, were submitted to the Court. All persons entitled to citation were properly cited.

The Court did decree on August 18, 1980, that MARY BETH GOAD and ROLAND LEE GOAD be divorced, but that the cause be continued until August 25, 1980 to allow briefs to be filed regarding the division of the estate of the parties.

On August 25, 1980, Petitioner appeared by attorney, Respondent appeared in person and the Court announced its judgement.

IT IS DECREED that MARY BETH GOAD, Petitioner, and ROLAND LEE GOAD, Respondent, be and they are hereby divorced.

The Court finds that there is no child of the marriage of Petitioner and Respondent now under 18 years of age and that none are expected.

The Court finds that the following is just and right having due regard for the rights of each party;

IT IS DECREED that the estate of the parties be divided as follows:

A. The real property, residence and improvements thereon located at Antoine Circle, in College Station, Brazos County, Texas is the sole and separate property of Petitioner's and Respondent is hereby divested of all right, title and interest in and to such property, including all escrow funds held by First Federal Savings and Loan for payment of insurance, taxes, and maintenance charges on 1418 Antoine Circle, College Station, Texas, as described above, provided that Petitioner pays to Respondent the sum of $14,625.00 by November 25, 1980.

If said payment is not made by Petitioner by November 25, 1980 then Respondent may pay to Petitioner the sum of $14,625.00 for all rights, title and interest in and to such property.

If neither party pays to the other the sum of $14,625.00 by said date, then the parties shall remain equal tenants in common of said property with the Petitioner and Respondent each owning an undivided fifty percent (50%) interest in 1418 Antoine Circle, College Station, Brazos County, Texas.

B. Beginning November 25, 1980, the party who purchases said residence from the other with the payment of the $14,625.00 shall pay the mortgage on said residence as it comes due, with

First Federal Savings and Loan of Bryan, Brazos County, Texas, and shall indemnify and hold the other harmless from any failure to so discharge such debt.

From August 25, 1980 to November 25, 1980, Respondent shall pay the monthly obligations of said mortgage with First Federal Savings and Loan as they come due.

If no purchase of said residence is made between the parties, then the unpaid balance due and owing on the mortgage with First Federal Savings and Loan for the residence at 1418 Antoine Circle, College Station, Texas, shall remain a joint obligation of the parties.

Petitioner is awarded the following as Petitioner's sole and separate property, and Respondent is hereby divested of all right, title and interest in and to such property.

1. All household furnishings, appliances, fixtures, wearing apparel, jewelry, and other personal property in Petitioner's possession or subject to Petitioner's control.

2. Any and all sums of cash in the possession of or subject to the control of Petitioner, including money on account in banks, savings institutions, or other financial institutions, which accounts stand in Petitioner's name or from which Petitioner has the right to withdraw funds which are subject to Petitioner's control.

3. 1976 V.W. Sedan

4. Any and all insurance, pensions, retirement benefits, and other benefits arising out of Petitioner's employment.

5. All right, title and interest in and to twelve/twenty-sevenths (12/27) of the United States Air Force Retirement benefits of ROLAND LEE GOAD AF# - 462368682.

IT IS FURTHER ORDERED, that ROLAND LEE GOAD shall, upon receipt of all United States Air Force Retirement benefits, immediately deliver twelve/twenty-sevenths (12/27) of said retirement benefit, by United States mail to MARY BETH GOAD at her current place of residence.

Respondent is awarded the following as Respondent's sole and separate property, and Petitioner is hereby divested of all right, title and interest in and to such property.

1. All wearing apparel, jewelry, and other personal property in Respondent's possession or subject to Respondent's control.

3. Any and all sums of cash in the possession of or subject to the control of Respondent, including money on account in banks, savings institutions, or other financial institutions which accounts stand in Respondent's name or from which Respondent has the right to withdraw funds or which are subject to Respondent's control.

All right, title, and interest in and to fifteen/twenty-sevenths (15/27) of the United States Air Force Retirement benefits of ROLAND LEE GOAD, AF# - 462368682.

IT IS DECREED that Respondent shall pay, as a part of the division of the estate of the parties, the following debts and obligations and shall hold Petitioner harmless from any failure to do so discharge such debts and obligations:

1. Loan from Brazos County Federal Employees Credit Union $708.00

2. Loan from Alfred Goad $650.00

3. Loan from Dale Goad $500.00

IT IS DECREED that each party shall bear his or her

own liability for taxes on income earned for the year 1980.

IT IS DECREED that Petitioner and Respondent shall execute all instruments necessary to effect this decree, specifically that ROLAND LEE GOAD execute to MARY BETH GOAD a General Warranty Deed conveying all his interest in and to the real property, residence and improvements thereon located at 1418 Antoine Circle in College Station, Texas, Brazos County, upon Mrs. Goad's payment to him of $14,625.00 for said interest, and that Petitioner and Respondent have all appropriate and necessary writs, execution, and process, as many and as often as is necessary to accomplish the execution and final disposition of this judgement.

All costs of court expended in this cause are adjudged against the party by whom incurred.

IT IS DECREED that all relief requested in this cause and not expressly granted herein be and is hereby denied.

SIGNED this 19th day of September 1980.

W.T. McDONALD, SR.
JUDGE PRESIDING
COURT OF CRIMINAL APPEALS
OF TEXAS, SITTING FOR THE
272ND DISTRICT COURT

Findings and decision of the 272nd District Court, Cause 23,862-A, filed by presiding judge on August 25, 1980.

NO. 23,862-A

IN THE MATTER OF THE MARRIAGE OF	IN THE DISTRICT COURT OF
	BRAZOS COUNTY, TEXAS
MARY BETH GOAD AND ROLAND LEE GOAD	272ND JUDICIAL DISTRICT

THE COURT'S MEMORANDUM BRIEF FOR ATTORNEYS

The issue for determination of this cause by this Court is actually the status of the Respondent's military retirement pay from the air force. The record reflects that the parties were married on April 8, 1950, and at the time of their marriage the Respondent was a member of the military service and had been since 1947. The record reflects that the Respondent retired in the year 1974 after 27 years military service. The record further reflects that the Respondent received as gross military pay for the year 1979 the sum of $15,471.76 and after deductions he received net pay of $13,467.96 from military retirement for the year 1979.

This Court has carefully read the authorities submitted by counsel in this case. The Respondent relies upon the decision of the United States Supreme Court in the case of *Hisquierdo vs. Hisquierdo* reported in 99 S. Ct. 802, 59 LED 2d pg. 1, recited on January 22, 1979. In this case the Supreme Court of California has awarded the wife an interest in the husband's expected retired benefits under the Railroad Retirement Act of 1974, but the Supreme Court of the United States reversed the judgement of the Supreme Court of California and in effect the Court held that the wife was not entitled to any of these benefits and held that such an award to compensate the wife in the husband's expected retirement

benefits payable under the Railroad Retirement Act was improper.

The Respondent also cites *Cose vs. Cose* cited by the Supreme Court of Alaska on March 30, 1979. The Supreme Court of Alaska followed the *Hisquierdo* case and held that armed forces retirement pay is not property which is divisible upon divorce. The Court observes that Alaska is not a community property state and furthermore, the Supreme Court of Texas has arrived at a different position in which it has distinguished the Railroad Retirement Act and a retirement thereunder from military retired pay. It is this Court's belief that the *Hisquierdo* decision does not apply because no issue concerning Railroad Retirement Act benefits are involved in the instant case. Post-Hisquierdo decisions have been uniform in restricting *Hisquierdo* to the narrow subject matter of Railroad Retirement Act benefits. The Arizona Supreme Court rejected the attempt to extend *Hisquierdo* to military retired pay. See the case of *Czarnecki v. Czarnecki*, 5 Family Law Reporter 2645 (decision rendered April 4, 1979). Similarly,a California Appeals Court has held that *Hisquierdo* does not apply to military retirement benefits. See *Gorman vs. Gorman*, 5 Family Law Reporter 2441 (California Court of Appeals - 4th District, decision rendered March 14, 1979).

The Supreme Court of Texas held in *Taggart v. Taggart* 552 SW2d 422 (1977) and *Cearley vs. Cearley* 554 SW2d 661 (1976) and *Busby vs. Busby* 467 SW2d 551 (1970), that military retirement pay was community property and divisible upon divorce. Perhaps the latest case decided is that of *Spencer vs. Spencer* cited by the Court of Civil Appeals of El Paso on October 17, 1979, in which the wife was held to have an interest in husband's military retirement benefits after her divorce from him.

For the above reasons stated, the Court finds that Mary Beth Goad does have an interest in the retirement benefits of the Respondent and that said benefits constitute community

property of the parties. Since three years of the 27-year military service was served by the Respondent prior to his marriage to the Petitioner, there remains 24/27 as the fractional part of said pay constituting community property which means that the Petitioner is entitled to receive one-half of 24/27 or an interest of 12/27 in and to all future military retirement benefits paid to the Respondent and the Respondent is in turn the owner of the remaining one-half of the community interest constituting 12/27 plus his separate interest therein of 3/27 so that Respondent's total interest amounts to 15/27.

The Court further finds that the parties own as community property their home situated at Antoine in College Station, Texas, where the Petitioner currently resides. The testimony of both parties reflect that they value the property at $50,000 and further, the testimony reflects that the approximate indebtedness owing on the home to First Federal Savings and Loan Association of Bryan, Texas is $20,750, and that said loan on said property is being retired in monthly installments of approximately $210 per month, and that there are no current delinquent payments on said property. This Court does not feel that it would be fair and equitable to set aside this property to the Petitioner as she seeks to have the Court do. However, the Court does hereby set aside the home to the Petitioner conditioned that she will pay the Respondent one-half of his net equity in said property which said sum is arrived at by deducting from the value of the home of $50,000 the sum of $20,750 owing on the property, which leaves as the net community equity belonging to both parties the sum of $29,250, and dividing one-half of this sum, it amounts to $14,625. If the Petitioner pays to the Respondent the sum of $14,625 for his undivided community interest in the net proceeds of said home, then the title to said property is entirely divested out of the Respondent and fully vested in the Petitioner. This Order is predicated upon performance by the Petitioner within 90 days from this date, which means by November 25, 1980. During said 90-day period, the Petitioner is to occupy said home and the Respondent is required to keep the payments currently

paid on said home out of his own funds, but if at the end of said 90-day period on November 25, 1980, the Petitioner has not come forward and paid the Respondent the said sum of $14,625, at that time the Respondent is free to attempt to buy the interest of the Petitioner, or both parties are free to sell said property to a third party, and in the absence of any performance by November 25, 1980, then said property belongs to the Petitioner and Respondent equally as tenants in common and, of course, either party shall be free to file a petition of partition of said premises.

There has been a wide variation in the valuation placed by the parties hereto as to the household furniture and personal effects in this home. The Petitioner has placed a very modest value of approximately $1500 on the entire contents of said house but the Respondent has placed a very liberal value of $25,000 on said furniture and household goods. The evidence reflects that the current insurance policy carried on said premises covering the household goods and furniture is approximately $18,000; so there is a wide divergence of not less than $16,500 between what the Petitioner valued the property at and with it's insured for. This Court expresses a hope that the parties hereto will be able to resolve the differences of this furniture and household goods without intervention by this Court because this Court well knows, and the parties hereto should know that there is litte demand and little money paid for secondhand furniture. For that reason, the Court makes no effort to dispose of these household goods and furniture but leaves it to the parties to continue their joint ownership as tenants in common. If they cannot reach a settlement, either of them, of course, may petition the Court to appoint or partition said household items for them.

Cause No. 23,862-A

In The Matter Of The Marriage Of	In The District Court Of
	Brazos County, Texas
Mary Beth Goad And Roland Lee Goad	272nd Judicial District

ORDERS OF DISMISSAL

On the 19th day of October, 1981, came on to be heard for hearing the Amended Motion to Set Aside Part of Judgement That is Void for Lack of Jurisdiction Over Subject Matter, as filed by Roland Lee Goad, and Petition to Recover Amount Paid on Judgement Afterwards Found to be Void, as filed by Roland Lee Goad.

Roland Lee Goad appeared in person, pro se.

Mary Beth Goad appeared by attorney, J. Andrew Rollins.

The Court, after review of the record, and hearing the evidence and argument presented on behalf of the parties, finds that it has no jurisdiction to hear these matters presented to it.

IT IS THEREFORE ORDERED that the Amended Motion to Set Aside Part of Judgement That is Void for Lack of Jurisdiction Over Subject Matter and the Petition to Recover Amount Paid on Judgement Afterwards Found to be Void BE AND THEY ARE HEREBY DISMISSED for lack of jurisdiction. Costs of Court are assessed against Roland Lee Goad.

SIGNED: February 18, 1982.

J. BRAD. SMITH
Judge Presiding
272nd Judicial District
Brazos County, Texas

Motion filed in 272nd District Court on July 23, 1982. Motion denied per court order signed February 10, 1983 (App. A, p. la supra).

No. 23,862-A

In The Matter Of The Marriage Of	In The District Court Of
	Brazos County, Texas
Mary Beth Goad And Roland Lee Goad	272nd Judicial District

RESPONDENT'S MOTION TO VACATE OR SET ASIDE PORTION OF JUDGEMENT THAT IS VOID

ROLAND LEE GOAD, Respondent herein, respectfully moves the Court to issue an order vacating or setting aside so much of the Decree of Divorce as "awarded" MARY BETH GOAD as her separate property "All right, title and interest in and to twelve twenty-sevenths (12/27) of the United States Air Force Retirement benefits of ROLAND LEE GOAD AF462368682;" such judgement appearing of record in Volume 35, pages 636-639 of the minutes of this Court. A copy of subject Decree of Divorce is attached hereto and incorporated by reference the same as if fully copied and set forth and made a part hereof for all purposes.

I

This motion is premised upon the assertion (now made by both parties) that the purported division of the military retired pay as part of the estate of the parties was outside the jurisdictional power of the Court and is therefore void. Respondent's motion relies on five separate and distinct elements, any one of which is sufficient to support the conclusion that the part of the decree dividing the retired pay is void.

FIRST: The award constitutes post-divorce court awarded permanent alimony and is therefore void under State law.

SECOND: The award contravenes the specific non-assignment provisions of 37 U.S. Code, Section 701(c) as well as the general non-assignment provisions of 31 U.S. Code, Section 203, and is therefore preempted by operation of the Supremacy Clause of the United States Constitution.

THIRD: The requirement that directs the Respondent to forward a fractional portion of his retired pay to the Petitioner each month constitutes a prohibited garnishment action that contravenes Texas constitutional and statutory provisions as well as federal statutes. Such action is expressly preempted by 15 U.S. Code, Section 1673.

FOURTH: Insofar as the Decree of Divorce purports to impose a constructive trust upon a portion of Respondent's military retired pay, subject constructive trust operates as a forbidden seizure that contravenes the non-assignment provisions of federal law and federal case law going back to 1846.

FIFTH: By the Petitioner's own voluntary act, she has renounced any claim that the purported division of retired pay was either valid or enforceable, and thus by application of the doctrine of judicial estoppel, she is barred from ever making a contrary assertion in this, or any other court.

(omitted are 10 pages of written argument)

Special pleadings filed in 272nd District Court on January 6, 1983. Denied per court order signed February 10, 1983 (App. A, p. la supra)

No. 23,862-A

In The Matter Of The Marriage Of	In The District Court Of
	Brazos County, Texas
Mary Beth Goad	
And	272nd Judicial District
Roland Lee Goad	

ATTACK ON JUDGEMENT - CONSTITUTIONAL GROUNDS

TO THE HONORABLE JUDGE:

The Respondent reasonably believes that he has already advanced a sufficient number of proper reasons for the Court to conclude that the purported division of retired pay was and is void. However, because it appears that regardless of the Court's disposition of this question, the case will proceed to appellate level, the Respondent feels compelled to present one more valid and fundamental reason for concluding that the division of retired pay is and was void.

I

Article I, Section 3 of the Texas Constitution provides: "(N)o man ... is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services." See *Glasgow v. Terrell*, 100 Tex. 581, 102 S.W. 98 (1907).

And in Article I, Section 29 of the Texas Constitution it is stated: "(W)e declare that everything in this "Bill of Rights" is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto ... shall be void."

By the 10th Amendment of the Constitution all rights are retained by the States or the people except those delegated to the Federal Government.

II

From the foregoing it is clear that if military retired pay is properly found to be an exclusive separate public emolument or privilege, then the rights, if any, to such pay inure exclusively to the military member. Any award, however made, of exclusive public emoluments or privileges to the divorced former spouses of military personnel, except in consideration of public services, is excepted out of the general powers of government and are therefore void.

III

Military retired pay is not a pension, but rather is payment for a status held by the retiree. For example, in *Hooper v. Hartman,* 163 F.Supp. 437 (D.C. Cal. 1958) it was held that the pay was not a pension or annuity, but was an emolument of, and dependent upon, the office so held. Similarly the Court of Claims in *Lemley v. United States*, 75 F.Supp. 248 (1948), recognized the distinction between a military pension and military retired pay, with the latter being dependent upon, and in recognition of, an existing status. See also *Badeau v. United States*, 130 U.S. 439 (1888); *Hooper v. United States*, 326 F.2d 982 (Ct.Cl. 1964); *Bland v. Hartman,* 245 F.2d 311 (9th Cir. 1957); *Allen v. United States,* 91 F.Supp. 933 (Ct.Cl. 1950); *Marriage of Butler,* 543 S.W.2d 147 (Tex.Civ.App. - Texarkana 1976, writ dism'd) and 6 C.J.S. (Armed Services) Section 114 at p. 706.

***

Appellant's Brief in the Court of Appeals, Fourteenth Supreme Judicial District of Texas at Houston, filed on March 28, 1983 and dismissed on October 13, 1983 with order and opinion. (App. B & C, pp. 2a-4a supra)

B14-83-206-CV

IN THE
COURT OF APPEALS
FOR THE
FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT HOUSTON

ROLAND LEE GOAD Appellant
v.
MARY BETH GOAD Appellee

On Appeal from the District Court of Brazos County, Texas
272nd Judicial District

APPELLANT'S BRIEF

TO THE HONORABLE COURT OF APPEALS:

NATURE OF THE CASE

The parties were divorced in 1980 and neither party appealed the Decree of Divorce. The matter in controversy is the part of the Decree that awards the Appellee a fraction of Appellant's Air Force retirement benefits. The Appellant contends that, in dividing the Air Force retirement benefits, the trial court acted beyond its jurisdiction and therefore the portion of the Decree ordering such division was and is void *ab initio* and should be vacated or set aside.

On January 28, 1983 at a hearing on Appellant's motion to vacate a portion of the decree, judgement was rendered for Appellee to the effect that the division of retirement benefits was

and is valid. The Appellant seeks reversal of the holdings that the ordered division of Air Force retirement benefits was valid, and to have an order entered vacating or setting aside that portion of the Decree of Divorce.

STATEMENT OF POINTS OF ERROR

The District Court erred in dismissing Appellant's motion to vacate or set aside portion of judgement entered in 1980 that awarded the Appellee a fraction of Appellant's Air Force retirement benefits. The ordered division of Air Force retirement benefits is void:

POINT I because if enforced, it is in contravention of the Texas Constitutional provision that prohibits the granting of public emoluments except in consideration of public services.

POINT II because it is an award of permanent alimony, military retired pay being current compensation for a status presently held by the military member.

POINT III because the award, when made, violated the anti-assignment statutes in federal law and was therefore preempted by operation of the Supremacy Clause of the United States Constitution.

POINT IV because it operates as both a garnishment of current wages for personal services and a forbidden seizure of such wages.

POINT V because it has been rendered a nullity and unenforceable by the Appellee's own voluntary actions that constitute a waiver of any claim she may have had and also, by application of judicial estoppel, presenting an insurmountable barrier to any recovery by Appellee.

* * * * * * * * * * *

POINT OF ERROR III RESTATED

The ordered division of Air Force retirement benefits is void because the award, when made, violated the anti-assignment statutes in federal law and was therefore preempted by operation of the Supremacy Clause of the United States Constitution.

* * * * * * * * * * *

It is noteworthy to observe that when enacting the Uniformed Services Former Spouses' Protection Act (96 Stat. 730), the Congress has failed to either amend or repeal Title 37, U.S. Code, Section 701, consequently the Act only operates as a declaratory enactment which does not affect the judicial construction made by the Supreme Court in *McCarty*, 453 U.S. 228 n. 22. ***

The Defense Authorization Act was signed by the President on September 8, 1982. Title X of the Act is known as the Uniformed Services Former Spouses' Protection Act and is found in P. L. 97-252 (96 Stat. 730) which became effective February 1, 1983. The Act authorizes a state court to order a division of military retired pay as part of the property division in divorce proceedings. The Act also, for the first time, authorizes the Secretaries of the Uniformed Services to honor a court order awarding military retired pay to a former spouse of a military member. We believe that the application of the Act in any manner that deprives a military member of any of the pay or entitlements to retired pay earned as a result of military service performed prior to the effective date of the Act is precluded by the Contract Clause (Article I, Section 10, Clause 1) of the United States Constitution. Retroactive regulation that would impair the obligation of contrcts is not permitted. We also believe that Section 1006(b) of the Act (96 Stat. 737) insofar as it attempts to ratify or confirm any purported award or retired pay to former spouses made in judge-

ments entered prior to the effective date of the Act is unconstitutional and void, both because it is retrospective and because it is repugnant to the Taking Clause of the Fifth Amendment of the United States Constitution. Retrospective legislation is prohibited under the Fifth and Fourteenth Amendments when it divests any private vested rights or interest. See 16A Am. Jur.2d *Constitutional Law* Sectio 664 (1979). ***

By the Tenth Amendment to the United States Constitution all rights are retained by the States or the people except those delegated to the Federal Government. While the Contract Clause of the Constitution is directed at the states alone, it nevertheless states the policy of the founders of the Government on the question of impairing the obligation of contracts and that any Act of Congress that does impair the obligation of contracts is contrary to that policy and not within the powers delegated to the Federal Government, except in specific cases, such as bankruptcy. Even in those fields where from the grant of power, there is to be implied the power to impair the obligation of contracts, the power must nevertheless be exercised subject to the limitations of the Fifth Amendment of the Constitution. ***

We also believe that Title 10, U.S. Code, Section 1408(c)(1) (96 Stat. 731) insofar as these provisions of the Act attempt to give validity to judgements rendered before the effective date of the Act are unconstitutional under the Separation of Powers provisions of the United States Constitution. Congress does not possess and may not assume the exercise of judicial powers. Congress cannot annul, vacate, set aside, reverse, modify, or impair the final judgement of a court of competent jurisdiction. The United States Supreme Court remains such a court of competent jurisdiction. Furthermore statutes will not be applied retoractively to validate or invalidate judgements rendered before their passage. A statute should not be construed to impair the force or validity of a judgement previously obtained, to give validity to a judgement theretofore rendered without authority (as in this case now before this Court), or to authorize a judgement in a pending proceeding to which the party was not entitled at the time the action commenced. Statutory phrases have been construed to apply only to judgements obtained after the statute takes effect. ***

The rule is based on the well established principle of public law that the three great powers of government should be preserved as distinct from and independent of each other. *** In Title 10, U.S. Code, Section 1408(c)(1) (96 Stat. 731) the Congress had delegated to the courts authority to *authorize* and *order* payments out of the United States Treasury to the former spouses of military personnel, as their exclusive property right, specific amounts or percentage amounts of disposable retired pay, that would otherwise be the property of the military member. Under the statute, the award becomes a property right, within certain restrictions, owned by the former spouse during the remainder of his/her lifetime; the award, once made, becomes non-reviewable, non-cancellable and continues until the death of either party. Although no specific appropriation has been made for the purpose, the Act directs the Secretaries of the Uniformed Services to pay the awarded amounts, within certain limitations, out of funds appropriated for military pay. We believe that this delegation of authority to the courts is an unconstitutional delegation of legislative power by Congress. We also believe, if accepted by the courts, this is an unconstitutional assumption of legislative power by the courts. Section I, article I of the United States Constitution prescribes that "All legislative powers herein granted shall be vested in a Congress of the United States ..."; and in clause 7, section 9 of this article I of the Constitution it is prescribed that "No Money shall be drawn from the Treasury, but in consequence of Appropriations made by law ..." From these provisions of article I, it is clear that the authorization for the payment of public moneys must come from Congress. The Congress is without constitutional power to redelegate this power to any court, least of all a state court or a court in a foreign jurisdiction. We have long celebrated an ancient maxim of Roman law, *potestas delegata non posest delegari,* - a delegated power must not be redelegated. Our political theory regards the lawmaking power of Congress as a delegation of power to it by the people, it follows that delegation by Congress is redelegation. In human affairs it is at all

times important to have it clear where authority and responsibility rest. The United States Government has many obligations calling for the payment of money. Some of these obligations arise from contract, others from statute, or treaty, and still others from the Constitution itself. The obligation for disbursement of military pay arises by statute. Generally speaking, it is within the province of the courts to determine what obligations exist and the extent thereof, but the *payment* of these obligations is not a function of the courts. Rather, under the Constitution, the power to pay or to authorize payment of any moneys resides solely in the Congress. Furthermore, no officer of the Federal Government is authorized to pay a debt due *from* the United States, whether reduced to judgement or not, without an appropriation *for that purpose.* A serious constitutional question arises whether any court, especially a state court, or a court in a foreign jurisdiction, can direct payments of public money from the Treasury when there is no appropriation made by law *for that purpose.* ***

A conclusive pronouncement by the United States Supreme Court cannot be disregarded, otherwise it allows the Congress, by subsequent interpretive legislation, to direct a construction of a previously passed statute. It in effect, makes the Congress the court of last resort in this Nation. Such an unacceptable result is further aggravated when, as in the present case, the Congress attempts to reverse a decision of the highest court as to a statutory provision enacted by a previous Congress. The Congress in its attempt to direct construction of those statutes already in effect and to make its construction retroactive is clearly unconstitutional as violative of the separation of powers. Even if the construction directed by Congress is found to be the correct one, such holdings must be given only prospective application. ***

Appellant's motion for rehearing filed in the Court of Appeals Fourteenth Supreme Judicial District of Texas at Houston, on October 20, 1983. Motion overruled on October 27, 1983. No order or opinion.

B14-83-206-CV

IN THE
FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT HOUSTON

ROLAND LEE GOAD Appellant

v.

MARY BETH GOAD Appellee

On Appeal From The District Court of Brazos County, Texas
272nd Judicial District

APPELLANT'S MOTION FOR REHEARING

TO THE HONORABLE COURT OF APPEALS:

ROLAND LEE GOAD, Appellant in this cause, makes this motion for a rehearing of the decision of this Court rendered on October 13, 1983 whereby, on its own motion, this Court dismissed the appeal in this cause and respectfully shows:

POINT OF ERROR I

The Court of Appeals erred in dismissing this action for want of jurisdiction in this Court and in the trial court because the ordered division of Air Force retirement benefits contained in the Decree of Divorce signed on September 19, 1980 has been made void and unenforceable by an Act of Congress codified in Title 10, U.S. Code, section 1408 (96 Stat. 730, 1982) effective February 1, 1983.

(argument omitted)

POINT OF ERROR II

The Court of Appeals erred in dismissing this action for want of jurisdiction in this Court and in the trial court because the ordered division of Air Force retirement benefits contained in the Decree of Divorce signed on September 19, 1980 is void because it violates the Texas constitutional provision that no one is entitled to exclusive separate public emoluments, or privileges, but in consideration of public service.
(argument omitted)

POINT OF ERROR III

The Court of Appeals erred in dismissing this action for want of jurisdiction in this Court and in the trial court because the ordered division of Air Force retirement benefits contained in the Decree of Divorce signed on September 19, 1980 is void because such award is permanent alimony, military retired pay being current compensation for a current status.
(argument omitted)

POINT OF ERROR IV

The Court of Appeals erred in dismissing this action for want of jurisdiction in this Court and in the trial court because the ordered division of Air Force retirement benefits contained in the Decree of Divorce signed on September 19, 1980 is void because subject decree violates the provisions of Title 37, U.S. Code 701(c) which provides that "An enlisted member of the Army or Air Force may not assign his pay, and if he does so, the assignment is void."
(argument omitted)

POINT OF ERROR V

The Court of Appeals erred in dismissing this action for

want of jurisdiction in this Court and in the trial court because the ordered division of Air Force retirement benefits contained in the Decree of Divorce signed on September 19, 1980 is void because subject decree operates as a prohibited garnishment and seizure of current wages for personal services and deprives Appellant of statutory exemptions contained in Texas constitutional and statutory provisions and in federal statutes. (argument omitted)

POINT OF ERROR VI

The Court of Appeals erred in dismissing this action for want of jurisdiction in this Court and in this trial court because the ordered division of Air Force retirement benefits contained in the Decree of Divorce signed on September 19, 1980 is void and unenforceable because Appellee has knowingly and voluntarily waived any right, title, or interest she may have had in the Air Force retirement benefits. (argument omitted)

PRAYER

WHEREFORE Appellant respectfully moves that the Court grant this motion for rehearing and that this cause be heard on the merits.

Respectfully submitted,

ROLAND LEE GOAD

Application for Writ of Error filed in the Texas Supreme Court on November 18, 1983. Application dismissed on February 22, 1984 with notation "No Reversible Error." *Goad v. Goad* C-2591, 27 Tex. Sup. Ct. J. 244 (Feb. 25, 1984).

NO. C-2591

IN THE
SUPREME COURT OF TEXAS

ROLAND LEE GOAD
Petitioner,
v.
MARY BETH GOAD
Respondent.

PETITIONER'S APPLICATION FOR WRIT OF ERROR

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner, ROLAND LEE GOAD, Appellant in Cause No. 14-83-206 CV in the Court of Appeals for the Fourteenth Supreme Judicial District of Texas, at Houston, Texas, and Respondent in the district court, respectfully submits this application for writ of error to correct an error of law committed by the Court of Appeals in refusing to hear Petitioner's appeal filed in that court.
(Statement of the Case omitted)

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction of this suit under Subdivision 6 of Article 1728 of the Revised Civil Statutes.

POINT ONE

The Court of Appeals erred in dismissing Petitioner's action in the Court of Appeals for want of jurisdiction in that Court.

* * *

POINT ONE/B

The ordered division of Air Force retirement benefits is void because the order violates the Texas constitutional provisions that no one is entitled to exclusive separate public emoluments or privileges but in consideration of public service.

POINT ONE/C

The ordered division of Air Force retirement benefits is void because such award to Respondent constitutes an award of permanent alimony, military retired pay being current compensation for personal services.

POINT ONE/D

The ordered division of Air Force retirement benefits is void because such award to Respondent violates the provisions of Title 37, U.S. Code, section 701(c) which provides that "An enlisted member of the Army or Air Force may not assign his pay, and if he does so, the assignment is void."

POINT ONE/E

The ordered division of Air Force retirement benefits is void because such award to Respondent operates as a prohibited seizure of current wages for personal services and deprives Petitioner of:

1. exemptions contained in the Texas Constitution

2. exemptions contained in the Texas statutes

3. and exemptions provided in federal statutes.